UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD NEW YORK BRANCH OFFICE DIVISION OF JUDGES

J.J. CASSONE BAKERY, INC.

and CASE NO. 2-CA-36104

ALEJANDRO PONCE, An Individual

Karen M. Newman, Esq., for the General Counsel Marc L. Silverman, Esq., (Schiff Hardin LLP), of New York, New York, for the Respondent

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on October 27 and November 18 and 19, 2004. The Complaint alleges that Respondent, in violation of Section 8 (a) (1) and (3) of the Act, has refused to re-employ Alejandro Ponce since December 12, 2003. The Respondent denies that it has engaged in any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent on January 21, 2005, I make the following

Findings of Fact

I. Jurisdiction

The Respondent operates a commercial and retail bakery located in Port Chester, New York. Annually, Respondent purchases and receives at its facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act, and that Local 3, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent is a family-owned bakery established about 1920. Mary Lou Cassone is the vice-president and secretary of Respondent, a position she has occupied for 22 years. Her brother, Rocco (Rocky) Cassone, is president. Another sister has an ownership interest in the

bakery.

The bakery produces bread, rolls and pastries. It supplies grocery stores, delicatessens and food markets. Some goods are sold frozen and some are sold baked.

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Respondent employs about 208 people. Of these 156 employees worked in production and maintenance at the time of the instant hearing in November 2004. In the years 2000/2001 there were 166 production and maintenance employees. The decline in the number of employees is due to two factors: New equipment permits some jobs to be performed with fewer employees and the bakery lost its biggest customer of frozen products in the year 2000.

Mary Lou Cassone testified herein on behalf of Respondent. She stated that the bakery was comprised of the following departments located in a three-story building:¹

15 Sales and Managers, Office, Store, Cakes, Freezer

Day Ovens, Department #800, each shift has 9 to 11 employees.

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Employees manufacture bread, rolls and wedges. Employees take dough out of the refrigerators, place dough on peel boards, load the peel boards into the steam box and load the risen dough into the oven. Baking and using the ovens requires skills in assessing daily weather conditions and regulating the ovens accordingly. It takes months to learn to regulate and use the ovens, although lesser skills are required to cut bread and put the peel boards into position. Most oven positions pay low wage rates and are not considered skilled.

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Day Packing, Department # 300, approximately 29 employees.

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Employees sort items coming off conveyors, placing items into bags and boxes and loading these onto pallets which they then move to another location. The work is difficult and employees are moved from task to task in order to gain some respite. One of the tasks is performed sitting down and employees are rotated in and out of this position at 15 minute intervals.

Night Packing, Department # 900, approximately 39 employees.

Employees pack goods for delicatessens and route markets and they distribute goods to drivers. Employees lift and move boxes, bags and pallets.

40 Rolls, Department # 700, 7 or 8 employees.

Employees mix dough, watch a machine that stamps the rolls, they put rolls on peel boards and they place these into a steam box and then a refrigerator.

45 Downstairs Rolls.

Employees manufacture large rolls; the peel boards are heavier and the work is harder.

Cassone did not provide exhaustive details about all of the departments. Where facts such as number of employees and functions are not provided herein it is because Cassone did not testify about them.

The equipment is newer and so the work is faster paced.

Bread, Department # 600, approximately 25 employees.

Employees make bread from scratch hand knotting rolls and hand braiding bread where required. Employees lift peel boards and load these onto dollies which they then push to another location.

Mixed Department, #910.

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Employees engage in production, baking and packing. This is a very hectic and fast paced area.

Sanitation, Department #110, Approximately 20 employees.

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Employees perform tasks such as receiving, storing and carrying baskets and bags weighing 50 lbs, sweeping, cleaning and disassembling machinery for cleaning. Some jobs can be dangerous. Employees must move all over the bakery to perform their work.

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Respondent has been a party to various proceedings before the Board. The Union's attempts to represent the employees began in the 1970's, with the first election being held in February 1977 and a rerun election in January 1978. The first election was nullified and the second was not in favor of representation by the Union. *J.J. Cassone Bakery*, 247 NLRB 220 (1980). There appears to have been another unsuccessful Union campaign in 1982 or 1983. The Board found that in connection with a Union organizing campaign in 1985 the Respondent had discharged employees Jose Valdovinos and Gavino Castillo because of their activities on behalf of the Union and had threatened to close the plant if the Union became the employees' collective-bargaining representative. *J.J. Cassone Bakery*, 288 NLRB 406 (1988).

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Another organizing campaign began in September 1999. In connection with that campaign and election Administrative Law Judge Howard Edelman issued JD(NY)-06-(02). In an extremely detailed consideration of the evidence, Judge Edelman found that Respondent had unlawfully discharged employees Cesar Calderon, Adam Aguilar, Cabrilio Flores, Jose Mario Castro and Lorenzo Macua. Judge Edelman found that Respondent had unlawfully suspended employees Cesar Calderon, Adam Aquilar, Cabrilio Flores and Roberto Lastanau. Judge Edelman also found that Respondent had harassed employees by calling the police to its premises, unlawfully threatened its employees with loss of economic and non-economic benefits, threatened employees with reprisals and discharge, promised its employees benefits to induce them to abandon activities in support of the Union, interrogated its employees, created the impression of surveillance and informed its employees that it would be futile for them to engage in activities on behalf of the Union. Judge Edelman sustained numerous objections to the election conducted on December 21, 1999. Finally, Judge Edelman ordered that the election be set aside and that a rerun election be conducted. There has been no Board decision subsequent to the issuance of Judge Edelman's decision. Thus, it is possible that a rerun election will be conducted.

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B. Alejandro Ponce

Employment history

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Alejandro Ponce had worked in department #700, the rolls department, since August 1993. It is undisputed that Ponce has a clean disciplinary record at the bakery. Ponce's brother

is also employed in the bakery.

Ponce does not speak much English and he does not read English. He testified herein through an interpreter.

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Ponce generally worked from 8am to 7pm, but his hours varied depending on the volume of work. His immediate supervisor was Jesus Valdovinos. Ponce was paid \$7.60/hr. Ponce testified that his duties included operating a machine that cut the dough and shaped the rolls. Ponce placed racks and boards on the machine. He lifted various goods and materials, the heaviest of which were seed bags weighing about 50 lbs.

If the roll machine was out of operation Ponce would be sent to work in the packing area where he counted bread and packed it in bags and boxes. The heaviest bags and boxes weighed about 15 lbs.

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On Tuesdays, Ponce regularly filled in for a person in the oven department who did not work on Tuesdays. Ponce shaped and sized the bread before it was put in the oven.

Union Activities

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Ponce was active in the 1999 Union campaign described at length in ALJ Edelman's decision, cited above. Union meetings were held at Ponce's house, Ponce collected signed authorization cards from his co-workers and he served as an observer at the election. Ponce served on the Union organizing committee and his name appeared on a list of committee members which was circulated to all employees before the election. Judge Edelman's decision makes it clear that Respondent's management was in possession of the committee list. That decision states that Mary Lou Cassone displayed a copy of a letter containing the names at an employee meeting and that Rocky Cassone testified that he obtained a copy of the list.

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Manny Jimenez, the business agent/organizer for Local 3, helped organize the Respondent's employees before the 1999 election. Jimenez testified that the list of organizing committee members which included Ponce's name was sent to the Respondent and to all employees.

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Ponce testified that in October and November 2003 employees at the bakery were upset because they had not received a raise. Employees began signing Union authorization cards. Ponce had a number of blank cards left over from the 1999 campaign and he visited some bakery employees at home and obtained 10 or 11 signed cards.

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Mary Lou Cassone testified that in October and November 2003 she was aware that the Union was once again organizing at the bakery. Cassone said, "I believe a couple of people were quite annoyed that there were people going to their house." According to Cassone, "someone" brought an authorization card to her brother Rocco.

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As a result of the renewed organizing efforts Mary Lou Cassone distributed a letter dated November 25, 2003 to employees of the bakery. The letter was typed in English on one side of the paper and in Spanish on the other side of the paper. The letter stated, in part

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It has now been several weeks that the Union has been pestering our employees to sign union cards. ... You have the right not to sign union cards if you don't want to. ... We hope that the Union will just disappear as it has so many times before.

JD(NY)-06-05

We appreciate all of your efforts during these difficult times. ... The Union is a distraction for both you and the Bakery. Let's keep sending them the message that we don't want or need the Union here.

Cassone testified that after Respondent distributed this letter to its employees the Union organizing effort became very quiet.

Employee Juan Martinez Sosa testified without contradiction that two weeks before he received Mary Lou Cassone's letter he was on line in the bank along with his supervisor Moises Contreras.² Contreras asked about a rumor that Union authorization cards were being signed and Sosa informed Contreras that Ponce and other people who had been terminated were visiting employee homes and obtaining signed cards. One week later employee Jose Lara, who served as Respondent's observer in the 1999 election, asked Martinez Sosa about a rumor that Ponce was getting cards signed. Martinez Sosa confirmed that Ponce was soliciting signatures on Union cards. Neither Contreras nor Lara was called herein.

Work Injuries and Treatment

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Ponce testified that he sustained an injury to his hand at work toward the end of 1993.3 A few years later on Monday, May 25,1998 he injured his wrist while working at the bakery. Ponce was moving a cart loaded with peel boards. The cart hit a hole in the floor and Ponce's hand slipped and was banged against the wall. Ponce informed his supervisor of the injury and he consulted a doctor the next day. Ponce also told a secretary in the bakery office of his injury. Ponce did not work the rest of the week. He returned to his job on Saturday or Sunday, after the pain in his hand subsided. Ponce continued working but he felt pain occasionally. As a result, Ponce used only his "good" hand to do strenuous work. In October 1999, Ponce took one week off from work to rest his hand pursuant to his doctor's orders which cited swelling and pain in the right wrist. In 2000 Ponce felt pain in both his left shoulder and his right hand at work. He continued working with the pain. Eventually, Ponce's doctor told him that he needed an operation on his right wrist. Ponce continued working while he waited for the insurance company to authorize the operation. Although the New York State Workers Compensation Board authorized the surgery on April 10, 2000 the Respondent's insurance carrier did not authorize the surgeon to proceed. Ponce testified that attorneys from the Union intervened to obtain authorization for the surgery. The delay was not explained, but on December 12, 2000 the Respondent's insurance carrier apologized in writing to the surgeon for the delay in transmitting the authorization following the action of the Workers Compensation Board.

On January 29, 2001 Ponce saw Dr. Kevin Plancher who was going to perform the surgery on his hand. Dr. Plancher gave Ponce a note to the effect that he must cease work and that Ponce would be unable to work until the repairs to his wrist were completed. Ponce gave the note to the bakery office. The operation took place on February 13, 2001.

On May 10, 2001 Ponce saw Dr. Plancher who gave him a note permitting him to return to work on Monday, May 14. The note contained "restrictions" to the effect that Ponce should perform "light duty" work for four weeks and then return to the doctor so that a decision could be made whether he could go back to full duty. Ponce testified, without contradiction, that his

² Martinez Sosa testified through an interpreter.

³ Questions and statements by Counsel for Respondent on the record make it clear that Respondent maintains a complete file of Ponce's various on-the-job injuries and of his absences due to on-the-job injuries and medical appointments.

JD(NY)-06-05

brother took this note to the bakery and gave it to a secretary named Lorena Bonenja.

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On May 14 Ponce returned to work and he informed his supervisor Jesus Valdovino that he had a medical restriction. Valdovino said that he could not relocate Ponce, so Ponce worked in his customary position. Ponce said that he experienced a lot of pain in his shoulder and wrist and that by May 21 the pain was unbearable. Ponce went to see Respondent's manager David Locke and showed him a copy of the doctor's note concerning the light duty limitation. Locke asked Ponce what he wanted. Ponce replied that he wished Respondent to respect the limitations imposed by the doctor. Then Ponce asked for time off to obtain pain medication. In the event, there was no medicine at home and Ponce went to the emergency room where he was given a note stating that he was to consult Dr. Plancher on May 24 and that if Dr. Plancher agreed he could go to work on May 25. Ponce immediately telephoned the bakery and spoke to secretary Bonenja who told him to return to work right away. When Ponce explained that he had a document instructing him to return on May 25, Bonenja told him to come in the next day. On May 22 Ponce returned to the bakery and handed the latest doctor's note to the receptionist.⁴

On May 24, 2001 Ponce saw Dr. Russell Cavallo, an associate of Dr. Plancher, who gave him a note permitting return to work on May 28, 2001 with the restriction "Light duty (sedentary) work only. No heavy lifting or stair climbing." Dr. Cavallo's note diagnosed left shoulder impingement syndrome. Ponce then brought this note to the bakery. He spoke to General Manager David Locke and another manager named Linda. Bonenja acted as the translator for this meeting. Locke told Ponce that Respondent did not have any light duty work. Ponce testified that he could have worked doing the easier jobs in the roll department. Ponce said he could have done his regular Tuesday stint in the bread department pulling out the racks and cutting the bread. Ponce stated that while assigned to temporary duty there he has seen people in the packing department working while seated; they counted the breads and put them into bags.

After Ponce was informed that Respondent did not provide light duty work he saw Dr. Cavallo and explained that there was no light duty work. On June 1, 2001 the doctor gave Ponce a note stating that the patient "is totally disabled until further notice." The note diagnosed "shoulder impingement possible [illegible] fracture". Ponce duly gave this document to Marta, a secretary in Respondent's office. On cross-examination Ponce said that at this point he still wished to try light duty work but the doctor instructed him to take the note to work and Ponce did as he was told.⁵ Ponce collected Worker's Compensation benefits based upon the June 1, 2001 finding of total disability.

Ponce stated that after this time he forwarded some medical documents to the bakery by regular mail. He did not visit the bakery because he did not believe he would be permitted to

⁴ Mary Lou Cassone testified concerning Ponce's brief return to work in May 2001 that although he worked and was paid, "we weren't aware he came back." Cassone did not explain this strange testimony. Cassone did not say that Ponce had failed to follow any procedures relating to return to work following an injury. Cassone did not explain why she said Respondent was not aware of Ponce's return even though he was paid and he spoke to both supervisor Valdovino and manager Locke.

⁵ On cross-examination Counsel for Respondent suggested that Dr. Cavallo had signed a note stating that Ponce was totally disabled only because the bakery did not have light duty work. Ponce could not know what was in the doctor's mind and Respondent did not call the physician to testify herein.

see the Cassones. Ponce had tried to see them on other occasions and he could not get in to see them. Mary Lou Cassone did not deny Ponce's testimony that he forwarded medical documents to Respondent after June 1, 2001. She testified that between June 1 and December 31, 2001 Ponce did not contact the bakery. Linda Fitzpatrick, a secretary in Respondent's office, kept abreast of the progress of Ponce's Workers Compensation case by contacting Respondent's insurance carrier.

On July 25, 2001 Fitzpatrick faxed a request to Dr. Plancher's office requesting an update on Ponce's condition and asked for a return to work date. Plancher's nurse replied that Ponce had an appointment for a second opinion with another doctor. Ponce's "work status is light duty with no heavy carrying or usage of his right wrist for repetitive activity."

A note in Fitzpatrick's handwriting dated October 22, 2001 states that Ponce "needs more wrist surgery. Totally collapsed arthritically. Limited motion. Great pain when lifting more than 5 lbs."

Ponce underwent another operation on November 15, 2002. As is well documented from the file in the instant case and following the general rule in Workers Compensation cases, the Respondent's insurance carrier was in constant communication with the Workers Compensation Board concerning Ponce's condition. The Workers Compensation Board must approve treatment, including surgery, and when this approval is transmitted to the employer's insurance carrier the insurer must communicate with the surgeon to authorize the operation.

Ponce testified that after his surgeries he did physical therapy at the hospital three times a week for three months to strengthen his hand. Ponce then continued with the physical therapy at home.

On September 22, 2003 Dr. Plancher wrote to Respondent's insurance carrier stating that he had operated on Ponce's wrist on November 15, 2002 and giving the medical details of the surgery and Ponce's recovery and rehabilitation. Dr. Plancher stated that Ponce's hand "feels much stronger, but he cannot return to his regular job because this would be overuse of the hand and we would then have problems, need to fuse his wrist and create a need for another operation." Dr. Plancher went on to state that "I would like to see him back in 2 ½ months. He needs to attend a work hardening program and be evaluated for job alternatives. I would like to do his Maximum Medical Improvement evaluation in two months. We will take X-rays at that time. He is permitted to return to work light-duty. He can bring in a form to me and I will note which jobs he is allowed to do. He will hopefully receive approval for his job modification and a functional capacity evaluation."

Ponce testified that that before Dr. Plancher wrote this letter Ponce had explained what his duties were in the roll department, he had done a diagram of the jobs he performed and he had said how much the various bags weigh that he was required to move in the performance of his duties. Ponce had also discussed with the surgeon the types of jobs that existed in the bakery.

Termination of Ponce

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Mary Lou Cassone testified that Ponce was terminated on April 30, 2002 when his name was taken off the payroll.

It is undisputed that no termination notice was sent to Ponce by Respondent and that no oral communication was made to him that he was terminated from employment. Ponce testified

that he had never heard that he was terminated until Cassone testified in the instant hearing.

Mary Lou Cassone testified that on May 20, 2002 Respondent's insurance broker sent Ponce a notice that stated, in part:⁶

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Please be advised that your health benefits under Oxford Health Plans have been terminated as of May 1, 2002.

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You may elect to continue coverage. Below are the explanations of our enclosure which should assist you in your decision-making.

A number of forms and explanations of benefits were enclosed. This letter was in English only.

Ponce testified that he received the letter from the insurance company but that he could not read it. The letter had a lot of medical terms that he did not understand. Ponce explained that when he spoke to his doctors he was always assisted by a translator. Ponce saw that the letter pertained to insurance and he did not ask anyone to translate it for him.

Mary Lou Cassone testified that Respondent keeps injured employees who are out on Workers Compensation on the payroll for about one year and then it terminates them. During that last year Respondent continues to pay for health insurance benefits.

Attempts to Return to Work in 2003 and 2004

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Ponce returned to Dr. Plancher on December 12, 2003 and received a note stating that he "may return to light duty for both hands 12/15/03." Ponce went to the bakery and saw manager Locke who read the doctor's note and told Ponce to speak to Mary Lou Cassone about obtaining light duty work. Ponce gave his doctor's note to the receptionist and asked her to give it to Cassone. The receptionist came back and told Ponce in English, "no more job." Cassone did not come out to speak to Ponce.

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Mary Lou Cassone testified that she did nothing when she received this note permitting Ponce to return to work. Cassone said the reason was that Ponce had been terminated from his job. Further, there were no jobs available in Ponce's old department, rolls # 700. After Ponce had been injured the department continued to operate with only seven employees. No new employees have been hired in the rolls department.

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On January 9, 2004 Ponce saw Dr. Plancher again. Ponce told the doctor that the work in the bakery sanitation department was lighter than his regular work in the roll department. In the sanitation department one pushes a broom, lifts baskets and moves racks, but Ponce believes these are light. Ponce suggested the sanitation department to the surgeon "as a precaution" because he had been told that there was no light duty work at the bakery. Dr. Plancher gave Ponce a note stating that he "may return to work full duty/regular in the sanitation department." Ponce drafted a letter to Mary Lou Cassone which he had translated into English and sent by certified mail to the bakery on January 17. The letter enclosed Dr. Plancher's January 9 note and stated, in part

I am eager to return to work and I request that the necessary adjustments be made to this case.

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⁶ Although the notice was sent by the broker, it bore the Bakery's heading.

I ask you to reply back in writing about my labor status with the Company by any determination that you make about the request of this letter.

Mary Lou Cassone testified that after she received the January 9 note from Dr. Plancher Respondent inquired of the insurance company about the situation. She stated, "we wanted to see if there was any validity that he could have a job in another department. We were very surprised to get a letter like that from a doctor."

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Mary Lou Cassone did not reply Ponce's letter of January 17 stating that he wanted to return to work . She testified that she did not recall Ponce to work because he had been terminated.

The record contains a letter written by Dr. Plancher to Respondent's insurance carrier on January 29, 2004. The letter is apparently responding to some inquiry by the insurance carrier relating to the January 9 doctor's note to return Ponce to full duty in the sanitation department. Dr. Plancher's letter states in part

There seems to be some disagreement from Mr. Ponce's employer. ... The patient was to return to his job. It is true I took him off light-duty. He wanted to return to work full-duty. I am aware that I cannot dictate for any company that he needs to return to the sanitation department. At this point were he to return to the sanitation department, he would probably be able to perform his duties without restrictions.

Because of the great confusion, allow me to supersede all previous notes with the following information. Mr. Ponce may return to his original job with the following restriction: He may not lift greater than 100 pounds with this wrist.

At the present time he has no pain in the forearm with heavy labor. He has tried light-duty before and he was doing fine. He was given a 67% loss of use of the right hand, and now is hopefully going to return to his life. ... If he is unsuccessful with lifting ... or if he develops problems over the next few years, he may need a wrist fusion. At the present time he is ready to return to work as an active member of his previous firm.

Respondent cross-examined Ponce about the letter from Dr. Plancher. Ponce stated that he never informed the doctor that the bakery had provided him with light duty work. Ponce said that before his injury he had done packing work when his own machine was out of order. This was lighter work than his regular work.

On January 30 Ponce took Dr. Plancher's January 29 letter to Mary Lou Cassone's office and handed it to the receptionist. The receptionist returned with a letter which Ponce did not understand.⁷ Ponce asked Marta to interpret and she said there was no work for him.

On February 13, 2004 Ponce wrote to Cassone stating that he has been trying to obtain reinstatement since December 12, 2003 and requesting that Cassone "reply back to me in writing about my labor status with the Company." Ponce did not receive any response to this letter. Ponce testified herein that he was now capable of doing any kind of work in the bakery.

On none of Ponce's visits to the bakery in an attempt to be put to work was Ponce asked to fill out an application. Ponce did not request an application because he did not think he

⁷ There is nothing in the record to show what this letter might have been.

needed an application. Ponce had no idea that he had been terminated.

Mary Lou Cassone testified that she did not respond to Ponce's two letters about returning to work at the bakery because there was no reason to, Ponce had been terminated.

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Cassone testified that Ponce was not put to work for several reasons. First, Ponce had been terminated and Respondent had not filled his position in the rolls department. Also, the doctor's letter did not make sense to Cassone. Although the doctor said that the only restriction on Ponce was that he could not lift more than 100 lbs with his right wrist the doctor also wrote "he was given a 67% loss of use of the right hand." This "did not sound right" to Cassone. Cassone felt that Ponce was a bad risk and he could not last at the job. She said Ponce would cost the company money in the long run.⁸

Counsel for the General Counsel asked Mary Lou Cassone when she had made the decision not to take Ponce back. Cassone replied that she was not sure. Cassone stated that

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Ponce was in touch with her in December 2003 and it might have been in January 2004 that she made the decision. But Cassone also maintained that Ponce had been terminated in April 2002 and cited that as the reason for not responding to Ponce's inquiries. Cassone was unable to explain why Respondent questioned Dr. Plancher's suggestion that Ponce work in the sanitation department if he had been terminated and would not be taken back under any circumstances. Cassone eventually testified that Respondent questioned the doctor's suggestion "out of curiosity about the letter". When asked again when Respondent made the decision not to give Ponce a job, Cassone said he had been terminated earlier and there was no decision to make about Ponce's physical condition after that.

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Mary Lou Cassone stated that when she made the decision to terminate Ponce she did not recall that he had been a Union observer at the election. When she decided not to reemploy Ponce she had not spoken to Lara or Contreras about Ponce and she did not know he may have been obtaining cards in 2003. Cassone stated that Ponce's support for the Union did not play any role in his termination or in the decision not to re-employ him. Cassone said that Ponce's brother has worked in the bakery since 1996.⁹

Respondent's Practices Relating to Work Injuries

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The General Counsel presented witness Juan Martinez Sosa to testify concerning the employer's practices relating to transferring injured employees. Martinez Sosa has been employed by Respondent since 1988 packing bread in department #300. The supervisor is Moises Contreras. Martinez Sosa's only job duty is to pack bread into boxes, to place the filled boxes onto pallets and to move the pallets. According to Martinez Sosa a box of bread is light enough to be lifted with one hand. Martinez Sosa testified that on October 21, 2002 he picked

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⁹ There is no testimonial evidence in the record that Ponce's brother supports the Union. His name does not appear on the list of the Union organizing committee which had been distributed to employees and management at the bakery.

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⁸ I note that Respondent did not send any note to its insurance carrier or to Dr. Plancher asking him to explain the meaning of "he was given a 67% loss of use of right hand" and how this squared with the doctor's statement that the only restriction on Ponce was not to lift more than 100 lbs. Thus, there is absolutely no evidence in the record to explain what the doctor meant when he said that Ponce "was given a 67% loss of use of the right hand." Since the phrase is in the past tense it is probable that the doctor was referring to the past and contrasting the 67% loss with the present ability to return to work.

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up too many pallets at one time and injured his back. Martinez Sosa was out of work for 2 ½ months and he returned on January 5 or 6, 2003.

Martinez Sosa testified that other employees have been injured and were given less demanding jobs when they returned to work. Raul Mondojano worked in the oven department and injured his back by heavy lifting. Mondojano underwent an operation and when he returned to work after one year he was relocated to the packing department where he still works. Manuel Acosta worked in the ovens and after being out for a few days following an injury he was relocated to packing. Santos Tucio worked on a machine that packed bread into bags. Tucio had surgery on his shoulder and returned to work after 6 or 7 months, but he was given work on an easier machine. Now Tucio works side by side with Martinez Sosa taking boxes off a machine and placing them on pallets. Martinez Sosa stated that this type of job is easy: an 80 year old lady named Carmella Pappalardo stacks the boxes in the department without any problem.

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Mary Lou Cassone testified that the bakery does not have any light duty jobs. Cassone testified that employees who are hurt on the job are permitted to return only to their prior jobs. Injured employees will not be transferred to another department. Cassone said that maybe once or twice in the past an injured person has been transferred to another department: in this category she could only recall Raul Mondojano a thirty year employee. Cassone stated that in the past five years Respondent has not re-employed an employee who was out on Workers Compensation for four or five months. Cassone said that once employees are out they are not taken back. Referring to the employees identified by Martinez Sosa, Cassone stated that Mondojano was given special consideration because as a former employee on the ovens he knew the ovens very well. In 1998 Mondojano was returned to work after suffering an injury and given an easier job in the packing department, #300. She stressed that Mondojano is available as back-up for the ovens. Cassone did not contradict any of Martinez Sosa's testimony relating to Acosta, Tucio or Pappalardo.

Cassone testified that jobs in the rolls department were the easiest in the bakery.

Practices Relating to Employees Who Have Left the Bakery and Returned

Martinez Sosa testified that Prospero Chavez and Joaquin Chavez left the oven department to travel home to Mexico. Both were given their jobs back when they returned. Guillermo Morales worked the night shift. After he was away from work for a lengthy period of time he returned and was given a job in rolls, department #700. Umberto Chavez was fired from a night shift job and then rehired. Oscar Bonilla worked in sanitation, department #100. Bonilla was terminated for fighting on the job. After three years he was again employed by Respondent but then he was discharged after engaging in another fight.

Mary Lou Cassone testified that Respondent's policy is not to re-employ people who have been out too long. Respondent has not re-employed workers who left to visit their homeland and then sought to return to work in the bakery. Cassone said that such people have indeed asked to come back to work but she has refused to re-hire them.

The record shows that Cassone's testimony about its re-employment policy was not accurate. In fact, the Respondent regularly re-employs workers who have left for various reasons.

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Cassone testified that employee Ernesto Espinoza was one of three brothers working at the bakery. When their father became ill all three sons wanted to go home to Mexico to see

him. Cassone objected to all three leaving at the same time, so Ernesto Espinoza left the bakery and stayed with his father in Mexico for two years. Respondent rehired him upon his return to the US. Cassone did not specify whether the other brothers also left the bakery to see their father.

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Cassone testified that Oscar Bonilla, the husband of a secretary in Respondent's office, was fired for fighting in 1998. After two years he was re-hired but he got into another fight and was fired a second time.

Joaquin Chavez was hired by Respondent in 2001. He had worked at the bakery in the 1980's. Cassone stated that she did not know he had worked for the bakery previously when she rehired him.

Prospero Chavez was Respondent's second best oven man, according to Cassone. He left to deal with a drinking problem and then he was rehired.

Umberto Chavez was hired in 1998. Cassone stated that she checked the bakery's records going back to 1995 or 1996 and could not find a record that he had worked for the bakery prior to 1998. However, Cassone conceded that Martinez Sosa, who identified Chavez are a former discharged employee who was rehired, may well have been correct.

Cassone did not comment upon Martinez Sosa's testimony concerning the rehiring of Morales.

Recent Hiring at the Bakery

Mary Lou Cassone testified that most people hired at the bakery learn about the job through word of mouth. She stated that job applicants fill out a written application form, many times with the help of someone who reads English. Cassone said most job applications are discarded within a few days unless the person is hired and the document is placed in the personnel file. If an applicant is not hired then he would have to come back another time and fill out another application. Cassone said the applications pile up on a secretary's desk and then she gets rid of them.

Cassone testified that in 2004 one person was hired in the bread department, #600. This was Ernesto Espinoza who was hired on July 30, 2004. He worked for Respondent from 2000 to 2002 and left to return to Mexico. He was re-hired by Respondent as discussed above.

A number of workers were hired in 2004 for the ovens, department #800. Cassone said the position is not skilled but requires intense hard work and the employees must be physically strong. The oven positions pay \$6.50 per hour, one of the lowest rates at the bakery. The new oven employees and their dates of hire were:

Jose Reyes, March 20, 2004

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Felipe Baeza, May 22, 2004

Leonel Escobar, June 6, 2004

Antancio Espinoza, June 12, 2004 (application dated February 13, 2004)¹⁰

Arturo Dominguez, June 15, 2004

Mario Gerardo, July 15, 2004 (application dated April 12, 2004)¹¹

Cassone testified that Respondent also hired a number of employees in other departments:12

Ishmael Maya, June 13, 2004, daytime packing, #300.

Jose Garcia, August 8, 2004, daytime packing, #300 (application filled out June 11, 2004).

15 Cesar Duran, August 6, 2004, packing department #900. He was hired for the ovens but due to a lack of openings in that department Duran was sent to packing.

Victor Salazar, September 16, 2004, packing department #900.

20 Alvaceda, September 15, 2004, packing department #900.

Maria Ventura, September 30, 2004, packing department #900.

Rudy Leon, August 8, 2004, mixed department #910, (application filled out June 15, 2004). Leon's application states that he has a physical limitation but Cassone was not able to supply any information about this issue.

Carla Felo, October 5, 2004, mixed department #910.

Antonio Martinez, September 12, 2004, sanitation, department #110

C. Discussion and Conclusions

Credibility of the Witnesses

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I find that Ponce was a credible witness. He was forthright and cooperative on cross-examination by Counsel for Respondent and he did not try to evade any questions posed by Counsel. I find that Martinez Sosa was a credible witness. None of his testimony was contradicted by the documentary evidence and Mary Lou Cassone did not claim that his statements were false or incorrect. Further, Martinez Sosa's testimony about Contreras and Lara was not challenged by any other evidence.

Respondent's case turns on the testimony of Mary Lou Cassone. I have concluded that her testimony is not accurate, it is not in accord with the documentary evidence and it is internally shifting and self-contradictory. As a result, I conclude that Cassone was not a credible

¹⁰ Cassone stated that maybe his friends had repeatedly asked when he could be hired and then Espinoza had come in with a previously filled in application.

¹¹ Cassone stated that the secretary had held onto this application because she knew the person.

¹² I have excluded professional and sales titles.

witness and I shall not rely on her testimony.

First, many assertions made by Cassone were patently inaccurate when compared with the documents from Respondent's own files and when explored on cross-examination of Cassone. Cassone said that Respondent had a policy not to re-hire employees who left the bakery for an extended period of time for any reason including visits to their homeland, yet many employees have been rehired after lengthy absences and even after many years. Prospero Chavez was rehired after leaving the bakery to deal with a drinking problem. Joaquin Chavez was rehired after he had left to spend time at home in Mexico. Umberto Chavez was fired from the night shift before 1995 and rehired in 1998. Bonilla was fired for fighting on the job and rehired three years later. Ernesto Espinoza left the bakery for two years in order to care for his father in Mexico and he was rehired. Morales left the night shift and he was rehired after a lengthy absence from the bakery.

Second, Cassone's testimony about Respondent's policies with regard to employees who are injured at work was contrary to the undisputed facts. Cassone said that Respondent had a policy to refuse to rehire employees who have been out on Workers Compensation for four or five months. She said that there had been only one exception in the recent past. Yet, in addition to Mondojano, who was out of work for one year, Tucio was returned to work after 6 or 7 months. Cassone stated that the bakery had no jobs which were considered "light duty" and that, in any case, employees returning from time off due to injury must be returned to their old departments. Yet Mondojano was relocated to the packing department after he recovered from his injury, Tucio was given work on an easier machine than the one he worked on prior to his surgery and Acosta was relocated to packing after he injured himself working on the ovens.

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I find, contrary to the initial testimony of Cassone, that Respondent has a practice of returning employees to work even after surgery and lengthy periods of recuperation. I find that Respondent has a practice of relocating employees to easier jobs when they return to work following an injury. I find that Respondent has rehired many employees who were fired or who left the job for lengthy periods of time. Further, the documentary evidence shows that in August 2004 Respondent hired Rudy Leon who stated on his application that he had a physical limitation.

Finally, Cassone gave shifting testimony concerning the reason for not re-employing Ponce and the date when this decision was made. Thus, Cassone testified that Ponce was terminated in April 2002. She gave this as a reason for not responding to Ponce's visit to the bakery on December 12, 2003 asking for his job with light duty. Cassone also gave the termination as a reason for failing to reply to Ponce's two letters asking for his job in January and February 2004. Despite stating categorically that Ponce was not returned to work because he had been terminated in 2002 Cassone changed her testimony and then she said she did not return Ponce to work because his doctor's statements in 2004 that he was fit to return were ambiguous. Cassone testified that after the purported April 2002 termination Respondent inquired "out of curiosity" in January 2004 as to the validity of the doctor's note of January 9 permitting Ponce to return to work in the sanitation department. If Ponce's termination in 2002 had indeed been the reason for not re-employing him in 2004 there would have been nothing to inquire about. Yet, despite the fact that Cassone was curious about that subject she was apparently not curious enough to verify the doctor's final statement on January 29 that Ponce could go back to work with only a restriction of not lifting above 100 lbs. Cassone seized upon a phrase in this letter that Ponce "was given a 67% loss of use in the right hand" to justify her

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refusal to put him back to work.¹³

The subjects discussed above go to the heart of the instant case and Mary Lou Cassone's unreliable testimony on these points is material to my credibility findings. Because I have found Cassone's testimony to be inaccurate and unreliable I shall not credit her denials that Ponce's Union activities were the cause of Respondent's failure to re-employ him.

The evidence shows that Respondent was aware that Ponce was on the organizing committee in the 1999 campaign and that he served as an observer. The evidence shows that Respondent's supervisors were aware that Ponce was soliciting Union authorization cards in October and November 2003. Mary Lou Cassone was concerned about this latest organizing and she sent a letter in English and Spanish to all the bakery employees which clearly indicated that she did not want the Union and that she hoped her employees would reject the Union. The letter and Respondent's lengthy history of opposing the Union make it clear that Cassone views the avoidance of a Union as an important matter. I do not credit her statement that she did not recall that Ponce was a Union supporter and observer when she decided not to re-employ him. I do not credit her statement that Contreras and Lara did not inform her of Ponce's organizing in late 2003. Cassone testified that after her November 25, 2003 letter to employees things got very quiet. Cassone could only know this if she was being kept abreast of what was going on with respect to the Union organizing effort.

I note that when the Board rules on ALJ Edelman's Decision in JD(NY)-06-02 the Respondent may be faced with another election. Thus it would be in Respondent's interest to avoid re-hiring Ponce, an active and committed Union supporter.

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I find that Cassone's testimony citing various and shifting reasons for failing to re-employ Ponce was a pretext to mask Respondent's determination to rid itself of a Union activist. The evidence shows that Respondent often rehired employees who had left for various reasons and that Respondent often relocated employees to easier jobs. Ponce's doctor had cleared him to work with only one restriction, that of not lifting more than 100 lbs with the right hand. If Respondent had sincerely wished to put Ponce to work it would have transmitted a question to the doctor about the "67%" issue in just the same way that a few weeks earlier it had transmitted a question about the "sanitation department" issue.

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Based on the discussion above I find that Ponce was a known Union supporter and that he engaged in Union activity, that Respondent was aware of Ponce's actions, that Respondent viewed its employees' attempts to be represented by the Union with hostility and that Ponce's support and activities on behalf of the Union were a motivating factor in Respondent's failure to re-employ Ponce once his doctor cleared him for work and Ponce sought work on December 12, 2003. I find that the purported "termination", the lack of hiring in the rolls department, the length of time Ponce was out of work and all the reasons relating to Ponce's physical condition are pretexts for Respondent's unlawful refusal to re-employ Ponce. *Wright Line*, 251 NLRB 1083 (1980).

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If Ponce had not been a supporter of the Union he would have been re-employed at the bakery. Ponce had regularly worked one day a week in the oven department before his surgery. The documentary evidence shows that Respondent hired six workers for the oven

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¹³ I note that at no time did Cassone state that Ponce was not re-employed because he had not filled out a job application form in 2003 or 2004.

¹⁴ As noted above, neither Contreras nor Lara was called herein.

department in 2004, including one person whose application was dated February 13, 2004, the same date as Ponce's last letter to Cassone asking to come back to work. Ponce and Martinez Sosa testified that employees who needed easier tasks were often placed in the packing department. Cassone herself acknowledged that this was true in the case of Mandojano. Further, the evidence shows that an 80 year old employee works in the packing department. Respondent hired six employees who were assigned packing duties in 2004. Ponce had often been assigned to work in the packing department when he could not be used in the rolls department. Ponce testified that he could perform the duties in the sanitation department. Respondent hired an employee in that department in 2004.

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Despite Cassone's testimony that application forms were discarded soon after they were completed if the person was not hired the documents show that Respondent regularly hired applicants who had not just filled out the form. Either the secretary knew the applicant and called when there was an opening or the applicant had friends who repeatedly inquired on his behalf for a job. Here, Ponce repeatedly had asked for a job after December 12, 2003 and had been refused. Cassone did not testify that Ponce would have been called back if he had filled out an application form. Clearly, she regarded Ponce's repeated visits and letters as sufficient application for any opening.

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I reject Respondent's position, stated at the hearing and in the Brief, that there was something wrong or suspicious about the series of doctors' notes that Ponce received. A careful reading of the notes together with Ponce's testimony about his conversations with his doctors shows that the surgeon and other doctors were treating Ponce with a view to putting Ponce back to work. This is indeed a laudable objective. Further, the record evidence demonstrates in the strongest way possible that Ponce himself wanted nothing more than to go back to work. Using words like "quackery" and seeking to denigrate Ponce's honest desire to work and earn his living should not obscure the real purport of the record herein. Further, I note that Respondent's Brief does not accurately or fully state the facts related to the doctors' notes and Ponce's treatment.

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Finally, although this issue is not dispositive, I find that Ponce had no way of knowing that he was purportedly terminated in April 2002. Respondent did not send Ponce a notice of termination. Respondent produced no witness who stated that Ponce was orally advised that he had been terminated on the various occasions that he personally visited the bakery. Although Ponce received a COBRA letter from Respondent's insurance carrier this letter was in English and contained no notice that Ponce had been terminated from his employment. Ponce's unrefuted testimony shows that Respondent communicates with its Spanish-speaking employees through Spanish-speaking supervisors and interpreters. When Respondent wants to communicate in writing with its employees it gives them a notice in both English and Spanish. It would be grotesque to require Ponce, a non-English speaker or reader, to infer from an insurance notice the further information that he had been terminated from his job. Moreover, General Counsel does not allege that the purported termination is unlawful. The Complaint alleges that Respondent has refused to re-employ Ponce since December 12, 2003. The charge was filed on February 19, 2004, well within the statutory period of limitations.

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Conclusions of Law

1. By refusing to re-employ Alejandro Ponce since December 12, 2003 Respondent has

¹⁵ The statement on page 10 of Respondent's Brief that the COBRA letter told Ponce that he had been terminated is incorrect.

violated Section 8 (a) (3) and (1) of the Act.

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Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to re-employ an employee, it must offer him employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date that he would have been re-employed to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The date Ponce would have been re-employed absent Respondent's unlawful discrimination will be determined in Compliance proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 16

20 ORDER

The Respondent, J.J. Cassone Bakery, Inc., Port Chester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Refusing to re-employ employees because they support Local 3, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL-CIO, or any other union.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer Alejandro Ponce employment, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- 40 (b) Make Alejandro Ponce whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Decision.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional
 Director may allow for good cause shown, provide at a reasonable place designated by the
 Board or its agents, all payroll records, social security payment records, timecards, personnel

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- (d) Within 14 days after service by the Region, post at its facility in Port Chester, New York copies of the attached Notice marked "Appendix." Copies of the Notice in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since December 12, 2003.
 - (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated

Dated

Eleanor MacDonald Administrative Law Judge

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¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to re-employ you or otherwise discriminate against any of you for supporting Local 3, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Alejandro Ponce re-employment, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alejandro Ponce whole for any loss of earnings and other benefits resulting from our unlawful failure to re-employ him, less any net interim earnings, plus interest.

				J.J. Cassone Bakery, Inc.		
35	Dated		Ву			
		_	_	(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104 (212) 264-0300, Hours of Operation: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.